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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW MEXICO

3

4 UNITED STATES OF AMERICA

5 vs.

No. 1:18-CR-3495-JCH

6 DOUGLAS SMITH

7

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9 TRANSCRIPT OF PROCEEDINGS
10 SENTENCING
11 September 15, 2022

12

13 BEFORE: HONORABLE JUDGE JUDITH C. HERRERA
UNITED STATES DISTRICT JUDGE

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I N D E X

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16 Certificate of Reporter
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1 THE COURT: Good morning to everyone. The
 2 Case Number is 18-CR-3495.

3 For the record can I please have counsel's
 4 appearances.

5 MS. WILSON: Good morning, Your Honor,
 6 Novaline Wilson on behalf of the United States.

7 THE COURT: Good morning, Ms. Wilson.

8 MR. ELSENHEIMER: Good morning, Your
 9 Honor, Aric Elsenheimer on behalf of Mr. Smith. I
 10 am joined at counsel table by Amanda Lavin with our
 11 office and Dorna Sabini who is a new lawyer in our
 12 office.

13 THE COURT: Good morning to all of you,
 14 and to Mr. Smith as well. We are here today on
 15 sentencing. Let me ask the general question, is
 16 everybody ready to proceed?

17 MS. WILSON: Yes, Your Honor.

18 MR. ELSENHEIMER: Yes, Your Honor.

19 THE COURT: Let me ask is either side
 20 intending to put on any evidence?

21 MS. WILSON: No, Your Honor. The
 22 United States, we had a trial in this case. I have
 23 a record and we will rely on that for today's
 24 sentencing. We had intended to call no witnesses.

25 THE COURT: How about allocution, anybody?

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1 MS. WILSON: Yes, Your Honor. The
 2 victim's sister Melanie Montoya was going to be here
 3 this morning. I see that she is not. I have tried
 4 to be in contact with her this morning. I am not
 5 sure where she is at. I am hoping she is on her
 6 way. It appears something may have come up but from
 7 the onset of this case she's always been involved.
 8 She always wanted to be here for sentencing, so I am
 9 hoping we see her soon. And if she comes in, we
 10 would like her to make a statement.

11 THE COURT: All right. Let me just ask,
 12 is that the same person who wrote the statement that
 13 you made available to us? It was attached to the
 14 original PSR.

15 MS. WILSON: Yes, Your Honor, yes.

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16 THE COURT: I have read that statement, so
17 if she doesn't make it here today, it is not as
18 though I am not aware of what her thoughts are.

19 MS. WILSON: Thank you. We appreciate
20 that.

21 THE COURT: Anybody that you intend to
22 have me hear from?

23 MR. ELSENHEIMER: No, Your Honor, no
24 witnesses. I do have a couple of demonstrative
25 exhibits. I don't anticipate that will take longer

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1 than 15 minutes, but no witnesses.

2 THE COURT: How are you intending to play
3 that? Do you want to play that before we get
4 started?

5 MR. ELSENHEIMER: It is part of my
6 argument for the objections so I can take it up with
7 the objections, if that is all right.

8 THE COURT: I know you have filed
9 objections. I know this case went to trial. I have
10 read all of your objections, you're sentencing memos
11 and so on.

12 Before I address the -- well, let me just
13 begin by taking up the objections. Why don't we
14 start with the objections and Mr. Elsenheimer, if
15 you want to go first, that is fine.

16 MR. ELSENHEIMER: Certainly, Your Honor.

17 Just for the sake of the record and to
18 make sure we are all on the same page, if I can just
19 review my objections. I believe that the Probation
20 Office has agreed with a couple of those.

21 The first objection I had was to the
22 characterization of the offense of conviction. I
23 believe that has been changed, and then the release
24 status has been changed.

25 So the first objection still under

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1 consideration by the Court would be our objection to
2 base offense level.

3 The second objection would be to
4 Mr. Smith's acceptance of responsibility.

5 And then finally there are a number of
6 objections that we had to the offense conduct
7 description.

8 So if the Court would like, I could begin
9 with our objection to the base offense level, if
10 that is all right.

11 THE COURT: Sure.

12 MR. ELSENHEIMER: So the base offense
13 level in the PSR is currently listed as level 18.
14 That is driven by what I believe is an incorrect
15 application of the Sentencing Guidelines in light of

16 the jury's finding in this case at trial.

17 So the involuntary manslaughter guideline
 18 Section 2A1.4 of the Sentencing Guidelines lists
 19 base offense level of 12 if the offense involved
 20 criminally negligent conduct. And 18 if the offense
 21 involved reckless conduct.

22 The PSR currently finds that the base
 23 offense level is 18. That, I believe,
 24 mischaracterizes what the jury found in this case.

25 If we looked at the jury instructions in

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1 this case, the jury, this is Instruction Number 6 of
 2 Document 201. That is the Court's instructions to
 3 the jury, that the instruction with regard to the
 4 offense of involuntary manslaughter. The second
 5 element of that is that the jury had to find that
 6 Jane Doe was killed while the defendant was
 7 committing a lawful act in an unlawful manner or
 8 without due caution and circumspection, which act
 9 might produce death.

10 The key language there is the language
 11 without due caution and circumspection. That is
 12 criminal negligence. It is not recklessness. It is
 13 not anything else, it is criminal negligence or as
 14 that particular instruction lists later on in the
 15 explanatory section gross negligence.

16 The Government must show that his conduct
 17 was grossly neglect. That is the first paragraph of
 18 Instruction 6 in Document 201 of the explanatory
 19 notes of that particular instruction to the jury.

20 Gross negligence is not recklessness. In
 21 this case the base offense level is 12 because there
 22 was a finding by the jury of what can only be
 23 described as criminally neglect conduct.

24 Mr. Smith acting without due caution and
 25 circumspection. And I don't think there is any way

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1 to find that it is recklessness. I think that if we
 2 have -- if a finding, if this is reckless then there
 3 is an involuntary manslaughter conviction that would
 4 fall under the base offense level of 12, everything
 5 would kick up to level 18 and that doesn't make
 6 sense for the particular guidelines.

7 I would ask the Court to sustain our
 8 objection and find that the base offense level is 12
 9 based on the jury's finding that Mr. Smith acted
 10 without due caution and circumspection.

11 THE COURT: Remind me, at trial did you
 12 object to the Court's Instruction Number 6?

13 MR. ELSHENHEIMER: We had proposed a
 14 different instruction but I don't think I objected
 15 to the Court's Instruction Number 6. I can't

16 remember.

17 THE COURT: I do remember that you had two
18 proposed instructions on involuntary manslaughter
19 that were slightly different than the Instruction
20 Number 6.

21 MR. ELSENHEIMER: That is correct.

22 THE COURT: But I couldn't, I didn't think
23 you objected to Instruction Number 6, okay. Well,
24 you want to take them one at a time or are you okay
25 with going through all of yours and then we will

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1 hear from the Government?

2 MR. ELSENHEIMER: Sure, I will be glad to
3 do that, Your Honor.

4 So the next objection we have is to the
5 presentence report finding Mr. Smith did not accept
6 responsibility. Let me read, so this is on Page
7 Number 2 of Document Number 222. It is Defense
8 Objection Number 4. It is the PSR's or the
9 Probation Office's summary of Mr. Smith's acceptance
10 of responsibility that we submitted in November of
11 2021.

12 Mr. Smith said in there and I am quoting
13 from that document. "Early in the morning of May 5,
14 2018 I was in bed at my home in Espanola,
15 New Mexico. I had been having problems with
16 break-ins and intruders on my property since the
17 year before. Because of these break-ins, my brother
18 Dan and I put up motion sensors. One of those
19 sensors was on the trailer behind my house that made
20 a doorbell like sound when someone walked by the
21 gate.

22 "Early in the morning, like around
23 midnight, I heard this ring, picked up my gun and
24 walked outside thinking it was probably raccoons
25 because I heard the sound earlier in the night.

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1 "I opened the back door and stepped behind
2 my house. I looked out and saw a shadow fumbling by
3 the door of the trailer directly behind my house.
4 The person, when they heard me open the door, turned
5 towards me and crouched down. I was scared and
6 fired my pistol to the left of the person to scare
7 them away. The person ran and I thought they had
8 run around the side of my property and towards the
9 road and left my property.

10 "To scare them away, I fired three more
11 times. I was absolutely scared witless when I saw
12 the person behind my house. And I fired my gun
13 because I was so scared. I did not mean to shoot
14 someone. I don't think I could have hit anyone when
15 I fired my gun. The only reason I fired my gun was

16 to scare them away.

17 "I am truly sorry that I hit someone and I
18 know that I was not as careful as I should have
19 been."

20 That was Mr. Smith's statement as part of
21 his acceptance of responsibility. The Probation
22 Office says this, The defendant did provide
23 Probation Office a statement of acceptance of
24 responsibility. Although the statement was provided
25 after he was convicted at trial and following the

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1 disclosure of the PSR therefore it does not appear
2 that the defendant is entitled to a reduction of his
3 base offense level for acceptance of responsibility.

4 That is incorrect. Mr. Smith since Day
5 One has accepted responsibility for this case. And
6 I just want to summarize and I have a couple of,
7 like I mentioned, demonstrative videos or audio
8 recordings for the Court to consider. The key note
9 there is the statement was provided after he was
10 convicted at trial and following disclosure of the
11 PSR. It is true that that statement we submitted
12 that after, disclosed after the trial and we
13 received the PSR.

14 That statement is a summary of basically
15 everything that Mr. Smith said from the moment he
16 called 911 to the end of his testimony at trial. I
17 just want to start with Mr. Smith's call to 911.
18 And what I have done is just taken a snippet of
19 that.

20 (Whereupon a portion of an audio recording
21 was played.)

22 MR. ELSENHEIMER: That was Mr. Smith's 911
23 call. Shortly after that, within five to ten
24 minutes, Espanola Police Department showed up at
25 Mr. Smith's house.

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1 This next clip is from Officer Rael's
2 lapel video when he first encounters Mr. Smith.
3 What I have done is I have taken the first half
4 minute or so of that. Following that is when
5 Officer Rael goes a different place, but I've taken
6 just his first encounter with Mr. Smith and that is
7 what follows.

8 (Whereupon a portion of an audio recording
9 was played.)

10 MR. ELSENHEIMER: Following that,
11 Your Honor, Officer Rael goes and does a protective
12 sweep of the house. He goes through Mr. Smith's
13 house, he comes back and interviews Mr. Smith and
14 this is that interview.

15 (Whereupon a portion of an audio recording

16 was played.)

17 MR. ELSENHEIMER: Mr. Smith's next
18 statement was later that morning around 5 o'clock,
19 so about three or four hours later with
20 Detective Abeyta at the Espanola Police Department.
21 That was a longer interview but I am going to play
22 two sections of that interview.

23 (Whereupon a portion of an audio recording
24 was played.)

25 MR. ELSENHEIMER: This last clip is the

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1 second clip from Mr. Smith's interview with
2 Detective Abeyta.

3 (Whereupon a portion of an audio recording
4 was played.)

5 MR. ELSENHEIMER: That is the end of the
6 clips that I have to show, Your Honor. At the end
7 of that last clip, Mr. Smith says, "As careful, as
8 careful as I should have been under the
9 circumstances."

10 Mr. Smith testified, I should also point
11 out, I don't have clips from Mr. Smith's interview
12 with the FBI. He says substantially the same thing
13 that he said to Detective Abeyta. He testified
14 before the jury, Your Honor heard his testimony. I
15 direct Your Honor to Page 52 and Page 53 of the
16 trial transcripts going on to Page 54.

17 That is where Mr. Smith summarizes,
18 essentially, where he testified in the same way that
19 he had stated during his interview with Detective
20 Abeyta, his interview with the FBI, and then his
21 trial testimony. In that testimony, let me just
22 read a very small section of that. It is starting
23 on Page 52. "And I stood there like I had been,
24 stood on my back porch, stood there looking and
25 watching. And then I saw a shadow with his back, I

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1 thought it was a guy. His back was towards me and
2 he was juggling the doorknob on the trailer. And
3 then he turned around and suddenly crouched down, I
4 tried to get out the back door as quietly as
5 possible in case it is raccoons, I would stand there
6 and watch them.

7 "But this guy turned around and crouched
8 down and the way he couched down I thought I was
9 about to be shot. I thought he was going to start
10 blasting away at me. Then there wasn't time. I was
11 like a sitting duck. Back behind me was white. He
12 couldn't see me more than I could see him. So I
13 cocked the pistol and I fired behind the trailer,
14 tried to get above the wire fence. It is a hog wire
15 fence with a little square thin enough that if a

16 bullet hits it, it could go anywhere.

17 "I wanted it to go off behind him, behind
18 the trail in that area there where it wouldn't hit
19 him, and it wouldn't hit anybody."

20 He carries on, "That person rose and took
21 off running in a sprint as fast as they could. At
22 that time my heart was pumping and I was shaky as
23 the dickens. I thought that the person had run off
24 and run towards the street. I wanted to warn them
25 again, warn this person who it might have been the

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1 same guy, I have no idea.

2 "And I fired but I was shaking just
3 pointing towards the woodpile. Because I was firing
4 faster than I ever fired before, I swear when I
5 pulled one time, I heard two shots. I don't know if
6 my pistol was capable of being a little machine gun.
7 It had never done that before. Because I heard two
8 rounds in quick succession, I figured they had a
9 gun. That's why I went to reload mine because I had
10 fired. I usually keep seven rounds in it. It will
11 hold 14. But if you leave them there for a long
12 period of time the clip spring just sort of gets
13 tired and it will jam so I keep it only about
14 halfway full.

15 "I had fired, I have no idea how many,
16 four, five, I thought. I went back, I went out the
17 gate and my pickup truck was there so I used it as a
18 table."

19 Mr. Smith said in his trial testimony
20 exactly what he said in his FBI interview, his
21 interview to Officer Abeyta. It was a shorter
22 interview to Officer Rael, but's essentially what he
23 told Officer Rael. That is somebody who has
24 accepted responsibility.

25 The second clip of what he said to the

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1 Officer Abeyta was, "I wasn't as careful, as careful
2 as I should have been."

3 The Probation Office recognizes that had
4 Mr. Smith made this statement that we submitted to
5 the Probation Office at any other point he would be
6 entitled to acceptance of responsibility.

7 Mr. Smith has made that statement. What
8 the statement we submitted was just a summary of
9 everything. It was a distillation of his multiple
10 times that he spoke with law enforcement.

11 I also want to point out, Your Honor,
12 Mr. Smith made two diagrams for law enforcement. He
13 made a diagram for Detective Abeyta. This is one of
14 the exhibits in the trial. I can bring it up on the
15 screen if it would help Your Honor. He made a

16 diagram for Detective Abeyta and he made a diagram
17 for the FBI.

18 That diagram, those diagrams Mr. Smith
19 made are these. So he was directing he was showing
20 the direction in which he fired shots. And it
21 might -- I don't know if Your Honor can see right
22 here, but where my cursor is it says, "first," that
23 was indicating his first shot toward the trailer.
24 He made the identical or substantially identical
25 diagram to the FBI.

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1 The Government hired an expert to do a
2 trajectory analysis. That trajectory analysis
3 confirmed what Mr. Smith said, that first shot the
4 one that hit the side of the trailer was exactly as
5 Mr. Smith said. Mr. Smith's statements effectively
6 helped law enforcement conduct their investigation
7 of the case. Mr. Smith's statements early on were
8 confirmed by later trajectory analysis that the
9 Government brought in to evaluate the scene.

10 This is all evidence of somebody who has
11 more than accepted responsibility. Who called 911,
12 interviewed with law enforcement, immediately after
13 that interviewed with Detective Abeyta, three days
14 later interviewed with the FBI and testified at
15 trial.

16 I urge the Court to find that Mr. Smith is
17 entitled to two levels for acceptance of
18 responsibility.

19 Lastly, Your Honor, I have a number of
20 objections to the offense conduct descriptions. I
21 am not sure how Your Honor wants to take those. I
22 can rest on the briefing of those just because they
23 are very precise as to each of the separate
24 paragraphs of the Presentence Report.

25 THE COURT: Let me ask you this. I am

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1 sure you have had a chance to review the addendum.
2 MR. ELSENHEIMER: Yes. I have the
3 addendum right here.

4 THE COURT: So in the addendum --

5 MR. ELSENHEIMER: As opposed to taking
6 them line by line, let me make an overarching
7 objection to the way that the offense conduct
8 description is characterized in the Presentence
9 Report.

10 The offense conduct description as the PSR
11 recognizes is drawn from the statement by the U.S.
12 Attorney's Office. That is all substantially
13 similar to what is in the criminal complaint and the
14 allegations and the argument around the charge of
15 second-degree murder.

16 But it is not offense conduct drawn from
17 the trial. A trial where Mr. Smith was found guilty
18 of the much lesser included offense of involuntary
19 manslaughter. That is our substantial objection.
20 It is language that the jury specifically found was
21 not correct as a matter of law. Mr. Smith was
22 convicted of involuntary manslaughter.

23 The language in the PSR affects conduct
24 still is riddled with language that would be more
25 appropriate to a conviction of second-degree murder.

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1 That is our overarching objection to the offense
2 conduct description.

3 THE COURT: Just so when I hear from the
4 Government, I will state that I recognized that
5 Probation prepared the offense conduct paragraphs
6 from information provided by the Government. And to
7 the extent they reviewed reports by law enforcement
8 and, of course, those were also more from the
9 viewpoint of the Government, I would say my reading
10 of the offense conduct probably agreed a little bit
11 more with your assessment than with the Government's
12 assessment. In other words, the offense conduct
13 looks like the Government's argument for
14 second-degree murder as opposed to what the jury
15 actually found, which was involuntary manslaughter.

16 So if the Government is providing
17 Probation with the facts, then I am not surprised
18 that that's how the paragraphs read. So I do think
19 that, I have read your briefs, so I will, of course,
20 hear from you in a moment, but I am concerned that
21 there are, you know, the Government put the language
22 together in a way that sounds like it would support
23 second-degree murder.

24 The defense objects and states facts that
25 sound more favorable to the defense, which is

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1 basically what happened at trial. The jury did not
2 convict the defendant of second-degree murder.

3 So I do think that the offense language
4 could be modified some, but, and I say that after
5 having reviewed the Government's response in
6 writing. I haven't heard your comments today, but I
7 just want you to know before you address the Court,
8 that I do share some of the concerns, so you might
9 be prepared to address that.

10 MR. ELSHENHEIMER: I don't believe I have
11 any other objections.

12 THE COURT: So the reason I asked you
13 whether you had had a chance to the review addendum
14 is because the addendum has the Probation
15 Department's response to your concerns. And I just

16 want to know whether the addendum captures all of
17 your concerns. So that was the only reason I was
18 asking.

19 The Defense Objection Number 5 and then
20 there is the Government response, Probation, I guess
21 Probation didn't take it line by line but --

22 MR. ELSENHEIMER: I guess, I don't
23 understand.

24 THE COURT: So your objection has a lot of
25 specific objections to particular sentences in
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1 particular paragraphs. So I want to make sure I
2 captured them all as I was reviewing your objections
3 and the Government's response.

4 The Government, I am not sure whether the
5 Government responded to each of your specific
6 sentences line by line like you set them out. So I
7 just want to make sure I didn't miss something, that
8 is all.

9 MR. ELSENHEIMER: No. I think that
10 characterizes my objections.

11 THE COURT: Because, you have a handful
12 of, maybe more than a handful of objections to
13 specific sentences and so it is a lot more detailed
14 than we normally see, a lot more of factual
15 objections, so I want to make sure I get them all.

16 Anything else?

17 MR. ELSENHEIMER: I believe it is all
18 characterized there.

19 Nothing else, Your Honor.

20 THE COURT: All right. I will hear from
21 Ms. Wilson next.

22 MS. WILSON: Thank you, Your Honor. I'll
23 go ahead and just start with the objections since
24 the last issue we talked about --

25 THE COURT: Well, they are all objections.
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1 MS. WILSON: The objection specifically to
2 the factual basis. Thank you, Your Honor.

3 From the United States' perspective there
4 are only two witnesses that were there that night.
5 And defendant, who is the surviving witness, so his
6 version of what happened is what, I believe, much of
7 his objections are based on.

8 The United States submits but it still
9 doesn't change the fact that at trial we heard that
10 he shot multiple times, four times, not once, not
11 twice, not even three times, but four times at a
12 person he knew that was a person. He talks about a
13 shadow and eyeballs. He knew that was a human being
14 and he still shot in that direction after the person
15 started to run. Aimlessly shooting into the dark

16 night.

17 Those are still the facts, no matter if
 18 defendant has objections to specific language,
 19 specific characterizations. And the United States
 20 is prepared to make concessions on that. I don't
 21 believe it is material to the sentencing and to the
 22 extent the Court wants to go through those, we are
 23 fine with that. But it still doesn't change the
 24 fundamental facts in this case.

25 Going to the acceptance of responsibility

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1 arguments, as Your Honor is aware from our briefing,
 2 there are rare circumstances, it can be provided
 3 after a defendant testifies at trial or goes to
 4 trial, but acceptance of responsibility after trial
 5 is rare. Because at times people go to trial to
 6 argue that they aren't guilty based on the mens rea.
 7 They don't have the requisite mens rea, and that's
 8 what happened in this case.

9 Yes, he says he killed Maria but he says
 10 it was an accident. I didn't mean to. We proceeded
 11 to trial, of course, on the theory of second-degree
 12 murder, extreme recklessness and we felt that based
 13 on the evidence presented, the Court could instruct
 14 the jury that alone regardlessness could be lower,
 15 so involuntary manslaughter also went to the Court,
 16 included a lesser offense.

17 We believe that he still challenged at
 18 that point at trial his requisite mens rea. And the
 19 case law is clear that that is not a basis for
 20 acceptance of responsibility and we would submit
 21 that this is like US v. Tom as submitted in our
 22 briefing and he's not entitled to that acceptance of
 23 responsibility. Because he maintained that this was
 24 an accident. He didn't mean to do it, and that is
 25 why we went to trial.

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1 In response to the level of enhancements
 2 that were applied in the PSR, with regard to
 3 recklessness, the United States submits, again, that
 4 this was a step-down from second-degree murder. We
 5 did talk to the Court during the time we were
 6 discussing the jury instructions. And it is my
 7 recollection that I did agree that that level of
 8 recklessness was an issue for the jury and that if
 9 it were not the high extreme level of recklessness
 10 warranted in our second degree, that the step-down
 11 was appropriate for a lesser degree of recklessness.

12 And again, Your Honor, it just doesn't
 13 change the facts in this case that the defendant
 14 knew he was shooting at a human being, shot four
 15 times into the dark. In the interview that we just

16 heard, he says he couldn't see but he still
17 continues to shoot. And he said if he would have
18 seen, he would have shot to miss. He intended to
19 shoot to miss.

20 But, Your Honor, we saw that it was dark
21 that night. You can see from the footage that there
22 is foliage there in that area and he was just
23 shooting. He said he wasn't thinking, he was just
24 pulling the trigger as fast as he could. We submit
25 that that is more than criminal negligence.

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1 Some of the examples of criminal
2 negligence that we submitted to the Court, leaving a
3 child in a locked car, leaving a loaded firearm for
4 a child, that is criminal negligence.

5 The intentionally pulling a trigger more
6 than once, four times at someone you know who is a
7 human being in the night, we would submit that that
8 is reckless, that the PSR level of 18 has been
9 appropriately assessed.

10 I am happy to answer any questions you
11 might have.

12 THE COURT: Well, let me hear any
13 additional comments and then I will have some
14 questions, probably, for you.

15 MR. ELSENHEIMER: Very briefly,
16 Your Honor. May I stay here?

17 THE COURT: Yes, you may. As long as my
18 court reporter can hear you, I am fine with that.

19 MR. ELSENHEIMER: Your Honor, it is
20 reserved for rare cases after trial where there is
21 acceptance of responsibility, and this is one of
22 those rare cases. And I won't say anymore, but you
23 heard the amount of times that Mr. Smith has said he
24 called 911, he met law enforcement three times, and
25 testified at trial. He has accepted responsibility

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1 and he should get the two level reduction.

2 With regard to the base offense level,
3 Mr. Smith, this is an accident. It was
4 unintentional shooting. Mr. Smith did not think he
5 was shooting at someone. He did not think he was
6 going to hit someone. It was an accident. That is
7 why it is involuntary manslaughter and the finding
8 of the jury was without due caution and
9 circumspection and that is gross negligence. It is
10 criminal negligence, it is not recklessness and that
11 puts this case at the base offense level of 12.

12 THE COURT: All right. So I will start, I
13 guess, then, with the base offense level. You know,
14 when I look at the Court's instruction to the jury,
15 I see the language that Mr. Elsenheimer directed the

16 Court's attention to.

17 The second prong of the elements that Jane
 18 Doe was killed while the defendant was committing a
 19 lawful act in an unlawful manner or without due
 20 caution and circumspection which act might produce
 21 death.

22 And then I do see the Page 2 explanations
 23 to the jury. And our instructions often contain
 24 language that help explain to the jury what certain
 25 elements might mean. And in this case I instructed
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1 the jury that in order to, I am not going read the
 2 whole thing, but in order to prove involuntary
 3 manslaughter the Government need not prove that the
 4 defendant specifically intended to cause the death
 5 of the victim. So we have got, we have heard about
 6 that. But it was proved more than that the
 7 defendant was merely negligent or that he failed to
 8 use reasonable care.

9 It goes on to say, The Government must
 10 show that his conduct was grossly negligent and that
 11 he had actual knowledge that his conduct was a
 12 threat to the lives of others or that he had
 13 knowledge of such circumstances as could reasonably
 14 be said to have made foreseeable to him the peril to
 15 which his acts might subject others.

16 And then this next sentence is I think
 17 important. The Government must prove gross
 18 negligence amounting to wanton and reckless
 19 disregard for human life.

20 The instructions go on to say that the
 21 substantive distinction between second-degree murder
 22 and involuntary manslaughter is the severity of the
 23 reckless and wanton behavior.

24 Second-degree murder involves reckless and
 25 wanton disregard for human life that is extreme in
 0028

1 nature, while involuntary manslaughter involves
 2 reckless and wanton disregard that is not extreme in
 3 nature.

4 So I think that the offense level was
 5 properly calculated in the PSR. I think that there
 6 is a degree of recklessness that is taken into
 7 consideration in the Court's instruction to the
 8 jury. So I do think that the base offense level is
 9 18, not 12, and so the objection is overruled.

10 I will go next to acceptance of
 11 responsibility. You know, it is clear that the
 12 defendant just immediately admitted that he shot his
 13 firearm and he has not challenged the fact that
 14 somebody died as a result. So he has admitted from
 15 the beginning to the facts that we heard that were,

16 that we both heard from Mr. Elsenheimer's reading
17 and also from what we heard and saw on the
18 recordings.

19 So that part is pretty clear, he has
20 admitted from the beginning. The question is did he
21 accept responsibility for the offense.

22 Now he was charged one count second-degree
23 murder. The jury found him not guilty of that. So
24 it is hard to hold it against the defendant, so to
25 speak, that he chose to go to trial when he went to
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1 trial and he won on the only count that the
2 Government brought against him.

3 So whether or not he accepted
4 responsibility for second-degree murder is not of
5 any value for us here. He was convicted of
6 voluntary manslaughter. And I don't know what he
7 may have done pretrial to demonstrate his acceptance
8 of responsibility for that offense.

9 Now, I know the defense submitted an
10 involuntary manslaughter jury instruction. The
11 Government didn't, but I don't know if submitting
12 that instruction constitutes acceptance of
13 responsibility for the offense, especially when, at
14 trial the defendant argued against a finding of
15 guilt for involuntary manslaughter.

16 So this is a very unusual case. I mean,
17 the defendant was charged with one thing,
18 second-degree murder, he won on that so why would he
19 accept responsibility for that pretrial. He is the
20 one who submitted an instruction for involuntary
21 manslaughter. Granted, I gave a different
22 instruction not the one the defendant proposed.

23 So did the defendant accept responsibility
24 for involuntary manslaughter before trial? I have
25 no way to gauge that. So unless anybody has any
0030

1 other information for the Court, I am inclined to
2 overrule the objection for additional reduction for
3 acceptance of responsibility because I have nothing
4 that tells me he accepted responsibility for the
5 offense.

6 I agree he admitted to firing, and I agree
7 he told us why. He had an intruder on his property
8 at 1:00 in the morning and, yes, it was dark, but I
9 didn't hear him accept responsibility for the
10 offense. So for that reason, the Court will
11 overrule the objection.

12 I don't have much to say, I will hear from
13 you in a moment. I don't have much to say on the
14 offense conduct objections. I think it probably
15 needs to be reworked a little bit, but I would be,

16 yeah, I don't think that it is useful to sit here
17 and go line by line. I think what I would suggest
18 is that before we finalize any judgment in this case
19 I will ask you-all to try to get together on a more,
20 I would say, actual recitation of the offense
21 conduct. And again, you know, I read the offense
22 conduct that was provided by the Government to
23 Probation and it, I mean, it does look like
24 second-degree murder, not involuntary manslaughter.
25 So I would prefer that it be a little bit more in

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1 line with how things actually came out.

2 I think the other thing I wanted to say
3 about the recklessness in terms of the offense level
4 is I probably would see your side, the defense side
5 of it more if the defendant hadn't fired his weapon
6 basically at the same height as a human being. I
7 mean, if he had shot above up in the air or maybe
8 not straight up in the air, but I mean over the
9 victim's head, he didn't know if it was a man or a
10 woman. I heard him say he would have felt better if
11 it was a big man but, you know, he wouldn't have
12 missed the big man either if he, if this individual
13 had been a big man.

14 So what I am saying is if he truly was
15 trying to miss a person, he didn't shoot at the
16 level that would miss a person. I understand it was
17 dark, it was 1:00 in the morning. I understand he
18 couldn't see very well, he saw shadows. I
19 understand that he was scared. I understand how
20 people react in the middle of the night when there
21 is an intruder on the property is a fearful time.
22 But I think that the defendant's line of fire
23 supports a finding of the jury's finding of
24 involuntary manslaughter and recklessness that may
25 not be extreme but reckless and wanton disregard

0032

1 nevertheless.

2 So that is another thing I wanted to
3 mention in terms of my ruling on your base offense
4 level objection. So I think you had something you
5 wanted to say, Mr. Elsenheimer. It looked like you
6 were trying to get the Court's attention.

7 MR. ELSENHEIMER: You had asked us about
8 what, if there is any evidence of what Mr. Smith did
9 before trial in terms of accepting responsibility
10 for involuntary manslaughter. I just, what I, to
11 answer that, what I want to just point out, again
12 when Mr. Smith was interviewing with Detective
13 Abeyta he said, "I wasn't as careful, as careful as
14 I should have been under the circumstances."

15 I don't know what other, what else one has

16 to do to accept responsibility. I just, factually
17 he effectively admitted everything that the jury
18 found. I don't see how there can ever be acceptance
19 of responsibility in a case in a circumstance where
20 someone goes to trial if it is not here. He has
21 said everything that essentially the jury was later
22 inclined in finding him guilty of involuntary
23 manslaughter. I think that is the basis for
24 acceptance given his statements and specifically the
25 statements about just under the circumstances he

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1 knows he could have been more careful.

2 THE COURT: Well, it is a bit of an
3 unusual case in the sense that he gave his
4 statements to law enforcement, none of which
5 included any kind of a denial about shooting. But
6 he goes to trial and prevails on the one count that
7 was brought by the Government against him.

8 So as I said before, it is not necessarily
9 in keeping with the authority the Government
10 provided in the brief. I mean, yeah, the Tom case,
11 I think the defendant went to trial but was
12 convicted of the charge that was brought against him
13 even though he challenged the mens rea. This is
14 different. He challenged and the jury agreed with
15 the defendant that he was not guilty on the count of
16 second-degree murder. But I still am of the mind
17 that while the defendant admitted to all the facts,
18 I just don't see where he admitted or accepted
19 responsibility for involuntary manslaughter. So
20 that is, I think the guideline requires the
21 defendant to accept responsibility for the offense
22 in order to get the reduction and points, so I am
23 overruling the objection on base offense level. I
24 am overruling the objection on acceptance of
25 responsibility, and I want to work with counsel

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1 separately on the offense conduct and we will do
2 that before the judgment is finalized.

3 Now the Government also had an objection,
4 so let's take that one up.

5 MS. WILSON: Thank you, Your Honor. The
6 United States is asking for the obstruction
7 enhancement to be applied in this case. The
8 defendant made statements under oath and he
9 testified about two uncorroborated narratives with
10 the willful intention of providing false testimony.
11 That is the Government's assertion.

12 He, as we heard in the recording,
13 initially states that he shot to miss even though
14 later he says it was too dark, I couldn't see, but I
15 shot to miss was his intention originally. Later on

16 that evolved into shooting at a woodpile. None of
17 those statements had come to any law enforcement
18 officers before he testified.

19 The United States would submit that he
20 submitted this fact, this untrue statement which is
21 material because it cuts against his statement about
22 where, why he was doing what he was doing, where he
23 was doing and goes directly to his mens rea.

24 The United States submits that this is a
25 manufactured set of events and again cannot be
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1 attributed to any confusion that he may have had,
2 mistake or faulty memory. The second statement that
3 the United States also has concern about is the
4 statement that his firearm was, he experienced his
5 firearm was firing two rounds with one trigger pull,
6 nothing supports this statement. We believe the
7 statement is material because he uses the statement
8 to justify his actions and why he continued to fire
9 as much as he did. And that contributes to his
10 recklessness with the firearm.

11 Again, there is nothing to show that these
12 statements were made out of confusion, mistake, or
13 faulty memory. None of these, neither of these two
14 statements were made to any law enforcement and the
15 United States submits that under 3C1.1 that the
enhancement for obstruction should apply.

17 I am happy to answer any questions you
18 might have.

19 THE COURT: Okay. Thank you, Ms. Wilson.
20 Your response?

21 MR. ELSENHEIMER: Your Honor, I will stand
22 on what we said. This is not appropriate for an
23 obstruction enhancement. Mr. Smith was recollecting
24 that he heard his gun fire faster than it had ever
25 fired before because in moments of extreme panic and
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1 fire and adrenaline we perceive things differently,
2 and that is just what he was expressing. It is not
3 even remotely close to perjury. And with regard to
4 the woodpile, part of the clip in talking to
5 Detective Abeyta you see that Detective Abeyta says
6 he reaches to the side, he said, so over to the
7 wood, over to the wood and Mr. Smith says yes. They
8 are talking about the woodpile. It is right there
9 on Mr. Smith's property. Obstruction is nowhere
10 near this case.

11 THE COURT: All right. Anything further?

12 MS. WILSON: Just in response to that.

13 The defendant never made any statement specifically
14 about a woodpile. I think how Detective Abeyta
15 decided to characterize the trees in that area could

16 have been arguably woods. That wasn't explored. I
17 don't know if that is the case but I think
18 characterizing it in that way, it doesn't take away
19 from the fact that there is nothing to show that
20 that statement was made on any prior occasion.

21 THE COURT: Thank you. Well, I am going
22 to overrule that objection. I don't feel that the
23 record gives the Court any basis to find that the
24 defendant perjured himself.

25 The firing of two rounds with one pull of
0037

1 the trigger, so to speak, I think that the defendant
2 has been, he has talked about that and even today he
3 said that he must have shot five rounds because
4 there were only two rounds left in the weapon when
5 he thought he had fired four rounds.

6 He was cross-examined about that at trial
7 and the concern apparently was that he may be trying
8 to set up a self-defense claim. But he was
9 cross-examined on that at trial, you are not
10 claiming self-defense, he said no. And that was
11 questioning by the Government. I just don't see
12 that I could find that there was perjury on the
13 firearm. I mean, he is telling us what he thought,
14 what he was thinking at the time. I can't conclude
15 from what I heard that it was manufactured. And the
16 same with the woodpile. Saying that he shot at the
17 woodpile is not a whole lot different than telling
18 us that he thought he was shooting to miss the
19 victim. I don't see enough to find that the
20 defendant committed perjury on telling us that he
21 shot toward a woodpile. He was asked about towards
22 the woods and does that mean woods or does it mean
23 woodpile. I just don't have enough to say that
24 there was perjury, so I am going to overrule the
25 objection.

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1 So I think I have given you what we need
2 to proceed with the hearing. Now, the offense
3 conduct, I think we all know what the offense
4 conduct was, so I feel like we can proceed with this
5 hearing even though we don't necessarily have
6 agreement on what the specific language in the PSR
7 will be regarding the offense conduct.

8 Is that okay with everybody?

9 MR. ELSENHEIMER: That is fine with us,
10 Your Honor.

11 MS. WILSON: Yes, Your Honor. For the
12 record, the United States doesn't mind conceding to
13 the specific concerns that defendant had within the
14 offense conduct and when we rework it we will keep
15 that in mind.

16 THE COURT: All right. Sounds good. Let
17 me ask Probation, is that workable for you? You can
18 get this, get these changes made before we finalize
19 the judgment?

20 THE PROBATION OFFICER: Yes, Your Honor,
21 that would be no problem.

22 THE COURT: I assumed as much, but I
23 thought I should doublecheck.

24 THE PROBATION OFFICER: Thank you.

25 THE COURT: All right. Thank you. So

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1 having then ruled on the objections, the Court will
2 adopt the factual findings that are contained in the
3 Presentence Report so that no evidentiary hearing
4 will be necessary today.

5 And so what I will do is hear from
6 everybody about what you-all believe the appropriate
7 sentence should be. I will, of course, give
8 Mr. Smith an opportunity to address the Court as
9 well. The Government may or may not have someone
10 who wants to address the Court.

11 MS. WILSON: We do, Your Honor, yes.

12 THE COURT: Since you do, let me hear from
13 that individual first.

14 Give us your full name and spell your last
15 name for the record.

16 THE WITNESS: My name is Melanie Jo
17 Montoya, M-O-N-T-O-Y-A.

18 THE COURT: Thank you.

19 MS. MONTOYA: These statements were
20 unbearable to write. How can I put into words the
21 loss of our unending regrets for me and my family.
22 My baby sister's name is Maria Elena Gallegos. She
23 was born on November 3, 1981. She was my only
24 biological sister and the last person left in my
25 family. Now it is just me with my children, my

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1 nephews, nieces, great nephews and great nieces.

2 She was taken from us on May 5, 2018. My
3 sister Maria is two years younger than me and I was
4 always her protector. I would never let anyone pick
5 on her when we were growing up. As we grew up we
6 lived next door to one another and helped each other
7 with our kids and celebrated everything together.

8 She was my baby-sitter while I was at work
9 and I was hers. Maria was compassionate, giving and
10 loving. Her and my son Nicholas shared a special
11 bond and they both lost their lives due to
12 unnecessary gun violence. I want everyone to know
13 what an amazing sister, friend, mother and auntie
14 she is and always will be. She was funny, caring
15 and was so proud of her kids, no matter what choices

16 she made in her short life.

17 Me and her children, Eric Santana,
18 Samantha Santiago, Don Quixote, and little Xavier
19 and her grandchildren, Jacob, Julian, Stephanie and
20 her nieces Victoria and Danielle love her and miss
21 her every day. I wish she could be here to see her
22 grandson Julian grow up, as I am raising him now. I
23 know if she was still here she would want that
24 responsibility, but I am doing this for her.

25 The chance of me telling all of this to my
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1 sister was taken from me. I will never get to see
2 her smile at me, hear her voice or see her get the
3 opportunity to change her life for the better. We
4 were robbed of this and so was she.

5 She was my and the kids only person. We
6 don't have our mom, our dad. We don't have our
7 grandparents. We don't have our aunts and uncles,
8 or cousins on my mom's side anymore it is just me
9 and all the kids now. I wish every day she was
10 here. Me and the kids need her and are lost without
11 her.

12 I feel that anyone who chooses to take
13 someone's life with a weapon should be 100 percent
14 held responsible to the fullest extent of the law.
15 There is no excuse to aimlessly firing a weapon in
16 the middle of a town and get away with it. It could
17 have been anyone's sister, anyone's mom or child,
18 but sadly it was mine.

19 I know in this life your punishment will
20 be confinement and that brings my family some
21 comfort knowing that you will not get the
22 opportunity to life, harm or be negligent with
23 another human life. You will have to answer for
24 your sins in another life and live with yourself as
25 well.

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1 My words and intention aren't going to be
2 paid to you anymore. My sister will live along with
3 her kids and her grandkids forever. I will make
4 sure they know what an amazing person she was and
5 how loved she was and always wanted us to be happy.
6 I am never going to let her be forgotten. She was
7 my baby sister, and I would know she would do the
8 same for me.

9 Thank you.

10 THE COURT: Thank you, Ms. Montoya.

11 Anyone else, Ms. Wilson?

12 MS. WILSON: No, Your Honor. Thank you.

13 I'm sorry, apologies, Your Honor, there is
14 one more.

15 THE COURT: So before you begin, give us

16 your name and spell your last name, please.

17 MS. HERRERA: Santana Herrera,

18 H-E-R-R-E-R-A.

19 I want to start out by saying how much we
20 miss my mom, me and all my siblings. She might have
21 not lived the best life, but one thing my mom always
22 was, was good to us. She always made sure that we
23 were loved and we were cared for. She never put us
24 in harm's way and my mom has never been an evil
25 person.

0043

1 So the fact that something so bad happened
2 to her is so hard for us. Because I don't have a
3 dad and as my aunt said, I don't have grandparents.
4 My aunt is all we have. I have a lot of siblings
5 and now we have nobody. All my siblings have gotten
6 separated. I have siblings that I don't get to see
7 no more. I have siblings that we just don't talk
8 and our lives are just bad without my mom.

9 And I am a mom myself. So to go on
10 without her and to try to learn to be the best mom I
11 could be is so hard. And I just want to say that I
12 hope my mom gets the justice she deserves because
13 she was such a beautiful woman and she didn't
14 deserve the pain she felt. She didn't deserve to be
15 left on a cold street dark in the night alone
16 hoping -- I don't know what her last thoughts were.
17 If she was hoping that her kids are going to be okay
18 because that is the only thing my mom ever cared
19 about was making sure we were okay.

20 So it breaks my heart to know that she was
21 left alone on a cold floor just hurting by herself
22 with no compassion, no comfort, with nothing. And
23 his life might be able to go on, but my mom will
24 never get to see another day. We will never get to
25 see another day with my mom. Our children will

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1 never get to know their grandmother. And I just
2 hope that she gets the justice she deserves,
3 Your Honor.

4 Thank you.

5 THE COURT: I believe that concludes the
6 comments from the victims; is that right?

7 MS. WILSON: Yes, Your Honor.

8 THE COURT: All right. So now I will take
9 your arguments on the appropriate sentence and then
10 I will also hear from Mr. Smith.

11 MR. ELSHENHEIMER: Thank you, Your Honor.
12 May we stand at the lecturn?

13 THE COURT: Yes.

14 MR. ELSHENHEIMER: Your Honor, on May 5
15 Mr. Smith was laying in bed in his house in

16 Espanola. He was not -- that night he was not out
17 looking for trouble. He did not go out as a
18 vigilante to seek trouble. He was not seeking to
19 confront anybody. He was in his bed and he saw an
20 intruder in his backyard.

21 And, Your Honor knows what happened in
22 this case, I don't need to rehash it or go through
23 it again. He was somebody who was terrified when he
24 confronted an intruder and he did not act with the
25 care he should have exercised but he acted because

0045 1 he was under the -- he was under the influence of
2 fear. That is one of the things that he said to the
3 FBI. They said, were you under the influence of
4 anything and he said he was under the influence of
5 fear and that is absolutely true. He was scared
6 when he was back there and because of that fear he
7 acted in the way that he did.

8 He did not go out seeking trouble. He was
9 in bed that night in his home and we know that
10 Mr. Smith did not go out seeking trouble, not just
11 because we know the facts of the case but because we
12 can look at his background. We can look at the
13 history that he has.

14 1975 was the only entry in Mr. Smith's
15 criminal history. I actually said in my sentencing
16 memorandum that he has over 30 years of good
17 conduct. I don't know why I said 30 years, it is
18 over 50 years of good conduct.

19 1975. Mr. Smith has a considerable amount
20 of time of good conduct. He has no, not even a
21 speeding ticket in those intervening 45 years. We
22 know he didn't go out in search of trouble because
23 his history and his past and his characteristics
24 tell us that. It tells us that this was a tragic
25 mistake but it was a mistake and it was an accident

0046 1 and that is at the root of what this is.
2 We are here because that night there was
3 an intruder on Mr. Smith's property. That is the
4 fact. And I don't in any way want to denigrate
5 anybody in this case, but that is what lies at the
6 root. And Mr. Smith's fear and his reaction to
7 that, the only sentence in light of Mr. Smith's
8 history, in light of his characteristics, what
9 happened in this case, the only sentence that is
10 appropriate under the guidelines is a sentence of
11 probation.

12 And I want to talk about that a little
13 bit, but first, I want to discuss just why we know
14 that a sentence of probation is appropriate in this
15 case. First of all, Mr. Smith has been on

16 supervised release since May of 2018, so over
 17 four years now. He has, not one, as far as I am
 18 aware, not one incident in that entire period of
 19 four years. He has been fully compliant with his
 20 conditions of supervision. He has a lifetime of
 21 model behavior, not a traffic offense, not a
 22 criminal offense, nothing, a model citizen for the
 23 entirety of his life.

24 He is a genuinely decent neighbor, not
 25 just a decent neighbor but when somebody in his
 0047

1 community needed help, Orcelia Trujillo, who is now
 2 his neighbor, when she lost her home and her sons
 3 didn't have a home, Mr. Smith opened part of his
 4 apartment to them and gave them a place to live.
 5 They paid him, but they are not wealthy by any
 6 means. They are not affluent people. They have
 7 problems with money and very often they are not able
 8 to make their full payment or any payment and
 9 Mr. Smith continues to let them stay there because
 10 he has a genuinely good heart. He is a genuinely
 11 good neighbor.

12 This is a genuine aberration, it fits the
 13 guideline definition of aberrant behavior. It calls
 14 under 3553 for a sentence of probation. If we look
 15 at the totality of the circumstances, everything
 16 that the -- that that statute that Congress intends
 17 a punishment to do, that Congress intends a sentence
 18 to do in this case calls for a sentence of
 19 probation.

20 Mr. Smith is 72 years old. This is not a
 21 man who can even make it in the Bureau of Prisons or
 22 who should be in the Bureau of Prisons. A sentence
 23 of probation is punishment.

24 In this sentencing memo I discuss that
 25 Congress recognizes that probation or supervision
 0048

1 serve as a form of punishment. It is certainly not
 2 as punitive as confinement but it serves as a form
 3 of punishment because it places significant
 4 conditions and restrictions on a person. It places
 5 restrictions on a man who is 72 years old,
 6 restrictions on his liberty, where he can go, what
 7 he can do. That is a punishment that serves the
 8 purposes of sentence under 3553.

9 We know that Mr. Smith will not have any
 10 problems while on probation given the behavior that
 11 he has had the last four years and given the past 45
 12 years of his life. Mr. Smith is a law-abiding
 13 person. He at 1:00 in the morning in his backyard
 14 confronted an intruder. He did not go out searching
 15 for that person and he made a mistake. It was an

16 accident and he regrets that. He recognized, as I
17 said earlier, he recognized when he was speaking
18 with Detective Abeyta, "I wasn't as careful, as
19 careful as I could have been under the
20 circumstances."

21 He is -- that summarizes the case right
22 there. He knows that he could have been more
23 careful, but his lack of care was not borne out of
24 any type of ill-will or intention or anything like
25 that it was borne out of the fear that he felt when

0049 1 he was confronted by somebody in his backyard. And
2 I just -- thinking about that, because I think about
3 my own backyard or I think about anybody who goes
4 into their backyard in the middle of the night and
5 confronts an intruder and that feeling of fear, that
6 feeling of fear, that punch you get in your heart it
7 is something that it is difficult to rationalize
8 over it and to think calmly through. That is what
9 happened in this case. It was borne out of that
10 punch to his heart of fear and Mr. Smith reacted to
11 that.

12 The punishment for that is something that
13 is, that places restrictions on Mr. Smith but
14 doesn't place him in confinement, that doesn't place
15 him in a position where he is in the Bureau of
16 Prisons or waiting to get to the Bureau of Prisons
17 in an environment that he has never, ever before in
18 his life has experienced.

19 The most he has ever spent in jail is the
20 five days that he spent when he was arrested in
21 Espanola and then released from this court, I think
22 on May 9th or 10th. It is the only period of time
23 he has ever spent in jail. I think he has five days
24 in, so the 10th. He was in custody from the 5th
25 until the 10th. That is the only period of time he

0050 1 has ever spent in jail in his entire life. Jail is
2 something that is not just, would not just be
3 difficult for him, it is an entirely foreign and
4 alien environment.

5 The Court can see him right here. There
6 is no way that he can survive the difficulties of
7 jail, of prison. And placement on probation serves
8 the purposes of punishment, it serves the purposes
9 of deterrence and it places, it's punitive in the
10 sense that it significantly restricts liberty,
11 Mr. Smith what he can do, where he can go, the types
12 of -- for that matter, the type of people that he
13 can see.

14 I would ask the Court to impose a sentence
15 of probation in this case. With probation the Court

16 would have the option down the road, I don't think
17 this is in any way conceivable, but would have the
18 option of resentencing if Mr. Smith ever came back
19 before the Court. But a period of probation is
20 appropriate under the Sentencing Guidelines. Given
21 that the guidelines are 27 to 33 months, it is not a
22 significant variance from the guidelines, but it is
23 appropriate if we take into account Mr. Smith's
24 history and characteristics, his long, long lifetime
25 of law-abiding behavior, the type of person he is

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1 and the type of family member he is.

2 I also want to point out, Your Honor, that
3 Mr. and Mrs. Wheat are here in the courtroom on the
4 right side. You may have remembered them from the
5 trial. Mr. Smith is a good neighbor for his
6 neighbor Orcelia Trujillo. He helps her out. He
7 helps out her son. I think there is a letter from
8 her son, Patrick Martinez, as well.

9 A sentence of probation accomplishes the
10 purposes of sentencing and it is sufficient but not
11 greater than necessary. It is that parsimony clause
12 that is critical in this case. It is sufficient.
13 It imposes punishment but it is not greater than
14 necessary.

15 A sentence to the Bureau of Prisons would
16 be greater than necessary to accomplish the purposes
17 of sentencing given all of the circumstances in
18 Mr. Smith's life, given all of his background and
19 given what happened that led to this case, given the
20 fact that he was laying in bed and would still be
21 laying in bed if there wasn't an intruder on his
22 property. Would have been laying in bed that whole
23 night if there wasn't an intruder on this property.
24 That is what precipitated this case. It wasn't what
25 Mr. Smith did. It wasn't something, him going out

0052

1 seeking trouble. He was home laying in bed and
2 given that, a sentence of probation is appropriate
3 here.

4 THE COURT: All right. Thank you,
5 Mr. Elsenheimer.

6 Mr. Smith, you do have the right to
7 address the Court before sentence is imposed. So if
8 you choose to do so, you may proceed.

9 THE DEFENDANT: I would like to read this.

10 THE COURT: All right.

11 THE DEFENDANT: Judge Herrera, thank you
12 for taking the time to listen to this letter. I
13 never thought I would be in this situation. Aside
14 from one drunk driving charge in my much younger
15 years, I have never had any run-ins with the law.

16 When I was younger growing up in Espanola
 17 it was a beautiful city, a small community with a
 18 history and an interconnectedness with Native
 19 American culture.

20 Espanola was once a safe place to live.
 21 As the years went by, my parents passed on and
 22 Espanola changed to what it is today, the heroin
 23 capital of the United States. I used to enjoy
 24 running a motel, I would meet travelers from all
 25 over the world. But as the years went by it became
 0053

1 more and more of a hassle. I was dealing with
 2 violence and drug use and it became far too much.

3 Closing down the Western Winds Motel was
 4 my only option. I decided to rent only to my friend
 5 Orcelia Trujillo and her family because they are
 6 honest God fearing people. This didn't end the
 7 criminal element. For years I dealt with break-ins
 8 and trespassers.

9 A local news would describe violent crime
 10 all around my home. The fear that I felt was
 11 enduring and imminent. We made changes, added
 12 motion sensors, notified law enforcement, but
 13 nothing got better. Things continued to get worse.

14 Today I stand before you for killing Maria
 15 Gallegos. I never expected to hurt anyone when I
 16 shot that night. I believed that I was shooting
 17 into a woodpile, that the person that was breaking
 18 into my mother's trailer had fled. To this day, I
 19 don't know how many people were there that night. I
 20 only knew the fear that I experienced.

21 My motion sensors had been going off all
 22 night and I saw someone eyeballing me like they were
 23 about to attack me.

24 I didn't know what was going to happen.
 25 There was no time to call the police. Shooting into
 0054

1 the woodpile seemed like a safe option to tell these
 2 people that breaking into my property wasn't safe.

3 Somehow my shot ended up in the worse
 4 place at the worse time. I didn't know that
 5 Ms. Gallegos was there. I never intended to hit
 6 her. I know that Ms. Gallegos has a family and
 7 people who love her. To them, I apologize. I know
 8 that every human life has the right to live.

9 Because of my actions Maria Gallegos will
 10 never be able to see her children again. It was not
 11 my place to take her life. Although it was an
 12 accident, it was because the extreme fear that
 13 caused me to shoot into the dark towards the
 14 woodpile. I did not think I was aiming at the
 15 height of the human being. I didn't want to shoot

16 straight up or down, I wanted the bullets to lodge
17 into the woodpile.

18 I am 72 years old and cannot survive in
19 jail. For the past four years I have complied with
20 all of my conditions and have never broken a rule.
21 The sorrow and regret for my actions never cease and
22 I will never own firearms again. This will never
23 happen again.

24 Apologies will never bring back Maria to
25 her family. I know that my actions have caused
0055

1 undue time with the Court, law enforcement and
2 mostly important to Maria's family. Please have
3 mercy on me. I respect your decision and ask that
4 you take into consideration all of the things you
5 heard during trial and know about this case.

6 Thank you.

7 THE COURT: Thank you, Mr. Smith,
8 Mr. Elsenheimer.

9 Ms. Wilson.

10 MS. WILSON: The defendant was aware of
11 the risk he created with his conduct and he knows
12 bullets are dangerous. That night knowing that
13 somebody was eyeballing him, he still chose to shoot
14 into the night at a height of a human being. All of
15 that foliage, without adequate lighting, near a busy
16 highway, near businesses, and keep in mind he is
17 shooting on a property that is marked as a motel.

18 The defense talked about an intruder
19 coming into your backyard. But this is a motel.
20 The sign is still up as a motel. There are no signs
21 up that say, "no trespassing."

22 People come back and forth, there is
23 pedestrian traffic. And defendant shoots four
24 times. He intentionally pulls that trigger four
25 times and he says he assumes the person had fled
0056

1 when he started shooting or that he was shooting at
2 the woodpile, but he didn't do anything to make sure
3 that person fled. He didn't yell out a warning. He
4 didn't use a flashlight to see where he was
5 shooting. He didn't shoot in the air and he did not
6 shoot in the ground. His conduct was not a mistake
7 or an accident. This was not just a failure to be
8 conscientious.

9 The defendant was incredibly reckless and
10 he disregarded the value of human life. The
11 defendant does not have the right to protect his
12 property with deadly force. He also testified he
13 was not acting in self-defense.

14 What is concerning to the United States is
15 that just a month prior to Maria being shot and

16 killed, the defendant told law enforcement he had
17 shot at another trespasser on his property. He told
18 law enforcement pow, pow, pow, again just like I did
19 with this girl. He shot multiple times at another
20 man as he fled his property. This isn't aberrant
21 behavior from the motel cop.

22 The defendant testified he patrolled his
23 property and even ran after another trespasser. He
24 is not a peaceful man. He shoots at trespassers as
25 they run away. He is not afraid. He had gone out

0057

1 multiple times that night. His gun was on the
2 counter ready to go. He is indignant and he clearly
3 disregards human life live through his outrageously
4 reckless conduct.

5 And just for the record, Your Honor, he
6 did test positive for marijuana on May 9, 2019 as
7 noted in the PSR Paragraph 4. So just to clarify he
8 has not been perfect on pretrial services. He
9 admitted to the use, no further action was done, but
10 that is still an act of noncompliance.

11 Maria's death was truly senseless. And
12 from the Government's perspective, this type of
13 arbitrary and senseless gun violence endangers the
14 whole community. He didn't know who he shot that
15 night, he was just shooting.

16 You heard from Maria's family. Her life
17 was important. She was precious to her family and
18 their loss is significant and they will feel the
19 harm for the rest of their lives.

20 And for those reasons the United States is
21 asking for a sentence of 60 months, funeral
22 expenses, and as noted in the Presentence Report, I
23 believe the amount is \$1,800. We would also ask for
24 a term of supervised release at the conclusion of
25 defendant's sentence.

0058

1 The United States has outlined in its
2 sentencing memorandum that the Court may consider
3 both a variance and a departure given the use of a
4 dangerous firearm in this case, and we believe that
5 those reasons for allowing an upward variance or
6 departure are warranted in this case.

7 Thank you.

8 THE COURT: Mr. Elsenheimer, anything
9 further?

10 MR. ELSENHEIMER: Yes, may I briefly
11 respond?

12 THE COURT: Yes.

13 MR. ELSENHEIMER: I know we talked about
14 this a lot at the trial and I am just going to go
15 over it again. But Mr. Smith's -- the Western Winds

16 Motel is not an operating motel. It was pitch black
17 behind his house. That was the backyard, it was not
18 a hotel. There is a difference and that difference
19 is clear and palpable to anybody who walked by it,
20 drove by it or probably live in Espanola or anywhere
21 that drives by that area.

22 Second, Mr. Smith has four years of fully
23 compliant behavior on supervision. He tested
24 positive for marijuana when he was released from
25 custody on May 9. That was the day he was released

0059

1 from custody. So that was not, whatever use there
2 was, was not a violation of his conditions or could
3 even be construed as a violation of his conditions
4 when he was tested when he was released.

5 That is all I wanted to clarify.

6 THE COURT: Thank you. I have just a
7 brief question for Probation. If you could come to
8 the bench for just a moment.

9 (Whereupon a Bench discussion was held off
10 the record.)

11 THE COURT: All right. I will ask
12 Mr. Smith and Mr. Elsenheimer to come to the podium,
13 please.

14 THE COURT: Let me begin by saying this
15 has been a truly tragic case. Tragic from, clearly
16 from the side of the victim, the victim's family. I
17 mean, somebody died, and there is no, you know,
18 there is no way to mitigate the injury. There is no
19 way to mitigate the pain that the family is going
20 through and so that is the first and foremost
21 observation that I have for you about how tragic
22 this situation is. So that is the first thing I
23 want to say.

24 The second thing that I want to say is
25 that I have, you know, I presided over the trial.

0060

1 Every hearing that has taken place in this case has
2 been, anything involving the evidence in this case
3 has been information that I have paid close
4 attention to.

5 So I understand that the defendant was
6 scared and, again, 1:00 in the morning, dark, an
7 intruder on his property. And I understand that the
8 defendant was scared, so I get all of that.

9 You know, the Government has argued that
10 this was a motel almost as if to say that the
11 defendant should expect that there would be people
12 on the property. It didn't sound that way to me
13 after hearing the testimony. What I do recall was
14 testimony that the motel was not open. The office
15 was not open. The lights were not on and I

16 certainly didn't hear any evidence that the motel
 17 attracted a lot of traffic from visiting travelers
 18 looking for a place to stay. I just didn't hear
 19 anything in the course of the trial that this
 20 property was understood to be any kind of a public
 21 space.

22 And I do recall from the testimony that
 23 this incident happened, the trailer was located
 24 behind the defendant's residence, not in the front.
 25 So I don't look at it as a place where there was a

0061 lot of foot traffic and the defendant should have
 1 expected that there could be people walking around.
 2 It sounded like the area where this happened would
 3 not have been an area where he would have expected
 4 people to be walking around.

6 I heard the testimony from the defendant
 7 that he had experienced other intruders over the
 8 course of time. I know the Government has suggested
 9 that that is his reaction, his response to other
 10 intruders should be taken into consideration as
 11 evidence of the defendant's, I guess, history and
 12 characteristics for some form of gun use, some form
 13 of violent conduct.

14 It is hard for the Court to take it that
 15 way because, first of all, the defendant was never
 16 charged with any kind of unlawful conduct before
 17 this. And to the extent that he did shoot his
 18 weapon at another intruder a month earlier, while I
 19 understand the Government's point, I don't know that
 20 that was ever determined to be an unlawful shooting
 21 and nobody was injured. So I just don't have enough
 22 information to conclude that the defendant has been
 23 conducting himself in a, you know, wildly careless
 24 way. I mean, it is his property. He doesn't want
 25 intruders on his property. I am sure there are a

0062 lot of ways to handle it, but until this instance
 1 there had been no other injury or anybody else who
 2 was harmed by the defendant.

4 Middle of the night, you hear an intruder,
 5 I have no question that the defendant felt fear and
 6 I think that that would be a common experience for
 7 most people who hear an intruder on their property
 8 at 1:00 in the morning to perhaps feel some fear.
 9 Then the question is what do you do about that fear?

10 In this case, of course, the defendant
 11 went out, saw a person, wanted to scare the person
 12 off and shot his weapon. And the defendant said
 13 that he thought that perhaps he might be shot.

14 Now this is not a case where the defendant
 15 claims self-defense. I don't see anything in the

16 case that would support that theory. So, again, the
17 jury, I think spoke to us about what the proper
18 response to the defendant's conduct was, and that
19 was a conviction for involuntary manslaughter.

20 I already said earlier that I thought that
21 the defendant's conduct supported a degree of
22 recklessness that is sufficient to support this
23 conviction. But I will say, again, that the
24 defendant could have, and I am sure the defendant
25 agrees in hindsight could have done things

0063 1 differently. But at that point when he made the
2 decision to shoot his gun, it was shot not at a high
3 level to avoid hitting somebody but it was shot at
4 exactly the level to hit someone and someone who was
5 not real, real tall. So that I think that there was
6 a degree of recklessness that, again, supports the
7 conviction in this case.

8 I have no doubt that Mr. Smith is
9 remorseful for what happened. He has said that,
10 time and time again. And I have no doubt that the
11 victim in this case, you know, I have heard that she
12 had a tough time. I don't know why she was there
13 that night, I will never know, but I don't say for a
14 moment that she deserved what came to her. I don't
15 think anybody says that and I don't want anybody to
16 feel that the Court feels like she deserved what
17 happened to her.

18 I have looked at all the arguments here,
19 you know, the Government suggests that I should
20 increase the, go above the guideline range because
21 of outrageously reckless conduct. And the briefing
22 mentioned more than once a degree of recklessness
23 that supports increasing the sentencing range here.

24 I will deny the Government's request. I
25 think that the jury instructions were pretty clear

0064 1 that the jury should find involuntary manslaughter
2 if they see that it involves reckless and wanton
3 disregard that is not extreme in danger.

4 So to the extent that the Government
5 argues that the facts in this case support an
6 outrageously reckless act, I would have to say that
7 the jury found otherwise. If the Government is
8 trying to say that the defendant's history and
9 characteristics because he has reacted to intruders
10 on his property in the past and therefore his
11 reaction to intruders in the past would support
12 other outrageously reckless conduct, again, I would
13 have to disagree with the Government on that.

14 I didn't, for reasons I have already
15 stated, it didn't appear that his prior conduct was

16 unlawful, at least was not brought to the Court's
 17 attention that it was. So, I decline to vary upward
 18 or grant any kind of an upward departure.

19 The defendant has asked for a sentence of
 20 probation arguing that, well, many things, that this
 21 was not an intentional act, this was an accident,
 22 the defendant is law-abiding, he has no prior
 23 convictions and he has performed well while on
 24 pretrial conditions of release.

25 There are certain things that I agree with
 0065

1 and certain things that I disagree with. I agree
 2 that the defendant has done well on pretrial
 3 conditions of release. I agree that the defendant
 4 is remorseful and that this was an accident. But I
 5 do not think that probation is the appropriate
 6 disposition in this case. I do feel that the level
 7 of recklessness, while not outrageously reckless,
 8 was nevertheless reckless and I do believe that a
 9 custodial sentence is appropriate in this case.

10 I know the guideline range is 27 to 33
 11 months. The Government has asked for 60 months. I
 12 intend to impose a sentence at the low end of the
 13 guidelines, 27 months, and I intend to make a
 14 recommendation to the Bureau of Prisons that the
 15 sentence be served at a facility that takes into
 16 consideration the age of the defendant and any
 17 medical conditions.

18 So my, I intend to recommend that to the
 19 extent the defendant qualifies for a medical
 20 facility, I will make that recommendation or if
 21 there is a facility that is on the lower end of the
 22 security level, I will recommend that. Because, I
 23 do believe that the facts in this case support a
 24 custodial sentence, but I also recognize that the
 25 defendant is older and may have medical issues that

0066
 1 are different from someone of a younger age.

2 So having said that, I will also say I
 3 have not heard anything about self-surrender, but I
 4 don't think the defendant is a danger or flight
 5 risk, so I do intend to allow self-surrender. So I
 6 haven't heard anybody on that.

7 MR. ELSHENHEIMER: We would be asking for
 8 self-surrender, Your Honor.

9 MS. WILSON: No objection, Your Honor.

10 THE COURT: All right. So unless anybody
 11 has anything else they want to say, I will proceed
 12 to pronounce sentence.

13 MR. ELSHENHEIMER: May I just say in terms
 14 of the Sentencing Guidelines and I want to just
 15 object to the guidelines. Your Honor, I, if

16 Your Honor were to think a custodial sentence is
17 appropriate, this is at least a case to consider a
18 variance from the Sentencing Guidelines given
19 everything that I discussed, but most particularly
20 Mr. Smith's age and his 72 years of virtually
21 unblemished conduct.

22 There are variances routinely in Federal
23 Court and this is a case that cries out for a
24 variance from the Sentencing Guideline range. Even
25 if the Court were to consider a custodial sentence

0067

1 as being appropriate, I think this is one where
2 Mr. Smith's zero criminal history, zero incidents
3 except for something in 1975 and the factors in the
4 case that precipitated what happened even though,
5 even if Mr. Smith acted as Your Honor said,
6 recklessly, this is something that is, that under
7 the guidelines or under the statute is more than
8 appropriate for a variance from the guidelines.

9 So I am asking the Court to reconsider a
10 variance from the guidelines even if Your Honor
11 thinks that a custodial sentence is appropriate. 27
12 months is a long time for somebody who is 72.

13 THE COURT: You know, I would have maybe,
14 expected isn't the right word. I would have looked
15 at, I will say that, I would have looked at any
16 argument you might have made but didn't to the
17 extent that you would have wanted a variance because
18 of his age. Age is something that is, it is not
19 unusual for Courts to look at that, but, you know, I
20 know how old he is, but there was no argument really
21 that was made.

22 MR. ELSENHEIMER: I thought I mentioned
23 that in my sentencing memorandum, Your Honor.

24 THE COURT: Mentioning, you did mention
25 his age, but, you know, I would have, I mean, I know
0068

1 how old he is.

2 MR. ELSENHEIMER: I apologize, that is my
3 fault. I thought that I mentioned his age as being
4 somebody who is 72, just not of the age to -- I am
5 sorry, I thought I made the argument.

6 THE COURT: Well, you did, but it was
7 almost, you know, it seemed like it was almost in
8 passing. You are emphasizing it more today than I
9 thought you did in the sentencing memorandum. But
10 in any event, I will just leave it at that.

11 Is there anything else you want me to
12 consider?

13 MR. ELSENHEIMER: Then in light of that, I
14 would ask you to reconsider your sentence in light
15 of Mr. Smith's age, his advanced age. I'm sorry,

16 that is on me that I didn't lay out in more detail.
17 I thought that my mentioning it in passing given the
18 fact that he was 72 and mentioning that it was a
19 basis for a variance was sufficient, but let me go
20 into that.

21 THE COURT: You are talking to somebody
22 who is not much younger than 72 so I would need a
23 little bit more specifics.

24 MR. ELSENHEIMER: I'm sorry about that,
25 Your Honor. Mr. Smith, if we look at him, Mr. Smith

0069

1 is frail. Some people at 72, like anybody of any
2 age, there is a variety. Mr. Smith is the type of
3 person who is old. His 72 is an advanced age and
4 for somebody who is of his age to go into the Bureau
5 of Prisons is remarkably difficult.

6 It is again, and I go back to what I was
7 saying earlier, he has never served a custodial
8 sentence before. The most he has ever served is
9 four, five days that he was in custody. To impose
10 27 months is remarkably more time than he has ever
11 served and that in and of itself serves as a basis
12 for a variance.

13 Mr. Smith's age is such that placing him
14 in the Bureau of Prisons is going to age him so much
15 faster and be so much more punitive for somebody of
16 his age than it is for somebody who is 35 or 40 or
17 even 50. That historically justifies a variance and
18 I would ask Your Honor to consider that.

19 MS. WILSON: Your Honor, in response, it
20 seems to me that in announcing your intention in the
21 sentence, you have considered his age. He is going
22 to a BOP facility and you are making a
23 recommendation that his medical needs be assessed
24 and taken care of.

25
0070

1 Defense had the opportunity to fully
2 examine this further through briefing, but I haven't
3 heard anything specific about this defendant that
4 warrants that type of a variance.

5 Your Honor, again, I would ask that you
6 impose a sentence as announced.

7 THE COURT: Yeah, you know, I, at this
8 stage of the game, I have nothing really to
9 distinguish this defendant for reasons beyond just
10 the fact that he is 72. I mean, the physical
11 condition description in the PSR doesn't give me any
12 kind of medical issue. I just, you know, I don't
13 have anything to go on. So he is 72, I know he is
72.

14 But my, as I said, I would, I know the
15 Bureau of Prisons is able to house people who are

16 older and so my recommendation to them would be, you
17 know, I am not expecting the defendant to be in a
18 situation where he is treated like someone who is,
19 you know, 25. So I, believe me, it doesn't, this
20 case doesn't bring any joy to anybody for any
21 reason.

22 Certainly brings me no satisfaction at all
23 to have to deal with the situation where somebody
24 shot and killed somebody. There is just, this is
25 just, as I said at the very beginning, tragic all

0071

1 the way around. So, you know, I am prepared to
2 proceed. I do want you to feel like I have
3 considered every argument. You know, you haven't
4 asked me for the opportunity to submit anything
5 else, so I am ready to go here.

6 MR. ELSENHEIMER: May I have a moment,
7 Your Honor?

8 THE COURT: Yes.

9 Mr. Elsenheimer?

10 MR. ELSENHEIMER: Well, Your Honor, in
11 terms of the age, I just think it is a factor under
12 3553 in and of itself. And I guess I would ask
13 Your Honor for additional time so that we could
14 submit additional materials with regard to
15 Mr. Smith, to what he does and the difficulties that
16 he would face were he to go to the Bureau of
17 Prisons, and to, I guess, further elaborate 3553
18 factors for the Court to consider.

19 This just is, to me, a sentence that under
20 3553 demands consideration of factors, 3553 factors
21 age, his history and characteristics as a variance
22 from the guideline sentence to examine that with
23 more detail.

24 THE COURT: So, you know, I -- here is why
25 I will give you additional time.

0072

1 When we got together here today you were
2 asking for certain reductions, you were asking for
3 certain enhancements. I think now that these have
4 been cleared away now that we know basically the, I
5 guess, sort of the four corners of the, what we are
6 looking at, I am willing to give you an opportunity
7 to address certain issues, 3553 issues now with the
8 added information of the Court's rulings on the
9 variances.

10 And Ms. Wilson?

11 MS. WILSON: And for the record we would
12 object, Your Honor. This sentencing has been held
13 in abeyance for some time. The victims need some
14 semblance of justice. Counsel had more than enough
15 time and opportunity to collect this information,

16 put these factors together. It seems to me that he
17 is taking yet another bite at the apple because he
18 is not happy with the custodial sentence.

19 And from our perspective this sentence
20 should go through. It should be a short time frame
21 on this additional evidence that you are wanting to
22 consider. Just for the interest of justice on
23 behalf of the victims, the United States is
24 compelled to put that in the record.

25 THE COURT: I understand that and I would
0073

1 do the same thing if I were in your place. I am not
2 saying I am going to change my mind but I, what I am
3 saying is there were a lot of unknowns when we
4 started this hearing. I have made rulings today
5 that kind of shift the framework just a little bit,
6 so I am willing to let you address other issues now
7 that you have the clarity of what it is we are
8 dealing with.

9 You know what I am inclined to do, I have
10 already said low end of the guideline range, and --
11 but I am willing to hear you. I frankly feel like
12 the defendant's age and conditions can be
13 accommodated by the Bureau of Prisons. That is what
14 I believe, so I am not -- don't mistake what I am
15 saying by any kind of a commitment on my part to
16 look at things differently. I just think it is
17 fair, it is fair to let the defendant have a little
18 bit more of an argument with the clarity of the
19 Court's rulings so --

20 MR. ELSENHEIMER: Thank you.

21 THE COURT: Having said that, I will give
22 you 14 days to submit something. Is that
23 sufficient?

24 MR. ELSENHEIMER: Your Honor, I have a
25 trial that starts on Monday it might go for a week
0074

1 and a half. You know how these could go a week,
2 week and a half. Could I have 21 days, yeah,
3 21 days.

4 THE COURT: 21 days.

5 MR. ELSENHEIMER: Actually, Your Honor, I
6 think one of the things we are going -- that
7 Your Honor would like to know is what can the Bureau
8 of Prisons do. Part of that may be a consultation
9 with an expert of the, former Bureau of Prisons.
10 That might take longer than 21 days. Could I alert
11 the Court in 21 days as to when I think I could have
12 a report from an expert?

13 THE COURT: I am agreeable to that but,
14 you know, you have other people in your office and I
15 am not going to drag it on for a month or

16 two months. I mean, I do want to get this resolved.

17 MR. ELSENHEIMER: Certainly.

18 MS. WILSON: We would object to that just
19 for the record, again, Your Honor, for the same
20 issues. I think 14 days is more than sufficient.
21 You're right, Your Honor, he has got counsel,
22 cocounsel and other resources available to assist
23 him in this endeavor. So, for the record.

24 Thank you.

25 THE COURT: All right. We will see in
0075

1 21 days how it is looking, but I am not expecting
2 you to tell me in 21 days you haven't been able to
3 reach anybody or, you know, I want to get this thing
4 going.

5 MR. ELSENHEIMER: Certainly, absolutely.

6 Thank you, Your Honor.

7 THE COURT: I will set something in the
8 next month or so and try to get this wrapped up.

9 MR. ELSENHEIMER: Thank you.

10 THE COURT: Thank you. We will be in
11 recess.

12 (Proceedings concluded at 11:27 a.m.)
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1 REPORTER'S CERTIFICATE
2

3 I certify that the foregoing is a correct
4 transcript from the record of proceedings in the
5 above-entitled matter. I further certify that the
6 transcript fees and format comply with those
7 prescribed by the Court and the Judicial Conference
8 of the United States.

9
10 Date: September 15, 2022
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